Boston College International and Comparative Law Review

Volume 29 | Issue 2 Article 4

5-1-2006

We Are the World? Justifying the U.S Supreme Court's Use of Contemporary Foreign Legal Practice in Atkins, Lawrence, and Roper

Andrew R. Dennington

WE ARE THE WORLD? JUSTIFYING THE U.S. SUPREME COURT'S USE OF CONTEMPORARY FOREIGN LEGAL PRACTICE IN *ATKINS*, *LAWRENCE*, AND *ROPER*

ANDREW R. DENNINGTON*

Abstract: Since 2002, the U.S. Supreme Court has consulted contemporary foreign legal judgments to help interpret, and dramatically expand, the substantive scope of the Bill of Rights in three landmark cases. It has not, however, explained when and why contemporary foreign legal materials are relevant to a principled, objective mode of constitutional interpretation. This Note represents an attempt to do so. It postulates two rationales that could retrospectively justify the Court's methodology in *Atkins v. Virginia* (2002), *Lawrence v. Texas* (2003), and *Roper v. Simmons* (2005). One is grounded in a theory of Anglo-American common law, the other rests on *jus cogens* and customary international law. This Note then compares the two and concludes that the *jus cogens* theory could best address critics' concerns that the use of foreign law will undermine U.S. sovereignty, reduce civil liberties in this country, and vastly increase judicial discretion.

INTRODUCTION

Since 2002, three landmark U.S. Supreme Court decisions—*Atkins v. Virginia*,[1] *Lawrence v. Texas*,[2] and *Roper v. Simmons*[3]—have collectively signaled a decisive shift in the Court's position regarding the relevance

* Andrew R. Dennington is Managing Editor of the *Boston College International & Comparative Law Review*. The author would like to thank Professors Charles Baron, Gregory Kalscheur, S.J., and Mark Spiegel for their advice and encouragement in connection with this Note.

This Note was also presented at the *Yale Journal of International Law*'s Fourth Annual Young Scholars Conference on March 4, 2006 at the Yale Law School. Portions of it also appeared at Andrew R. Dennington, *Hearing Aid: What Democrats Should Ask John Roberts*, NEW REPUBLIC ONLINE, Aug. 17, 2005, http://www.tnr.com/doc.mhtml?i=w050815&s=dennington081705.

[1] 536 U.S. 304 (2002).

[2] 539 U.S. 558 (2003).

[3] 543 U.S. 551 (2005).

of contemporary foreign legal practice to domestic constitutional interpretation.[4] In each of these cases, the Court used the legal judgments and experiences of European countries and the "world community" as aides in interpreting the substantive scope of the Eighth Amendment's prohibition against "cruel and unusual punishments"[5] and the Fourteenth Amendment's substantive due process clause.[6] This is remarkable given that, as recently as 1997, a majority of the Court clearly rejected this methodology as "inappropriate to the task of interpreting a constitution."[7]

Atkins, Lawrence, and *Roper* have ignited a political controversy in which conservatives denounce the practice as a threat to national sovereignty,[8] and liberals welcome a multilateral dialogue among the world's jurists about domestic human rights law.[9] Congressional Re-

---

[4] This Note focuses exclusively on the application of contemporary foreign legal materials to purely domestic constitutional questions, particularly those involving civil rights and civil liberties. It does not address the use of foreign law to interpret treaties or guide choice of law in cases involving foreign parties. Those questions pose fewer theoretical difficulties than the problems analyzed in this Note. *See* Justice Antonin Scalia, Foreign Legal Authority in the Federal Courts, Keynote Address at the 98th Annual Meeting of The American Society of International Law (Apr. 2, 2004), *in* 98 AM. SOC'Y INT'L L. PROC. 305, 305 (2004). Further, this Note does not concern itself with the use of *historical* foreign legal materials in domestic constitutional interpretation. Those materials, particularly English texts, are more obviously relevant to constitutional interpretation than *contemporary* foreign materials because they help illuminate the original meaning of the U.S. Constitution's now archaic words and phrases. *See id.* at 306.

I use the term "foreign legal practice" broadly to refer to the entire range of foreign materials that the Court consults when interpreting the U.S. Constitution. Liberals tend to think that Justices on the Court have merely been engaging in a friendly dialogue of sorts with their European counterparts, and this opinion rests upon the misconception that the Justices only cite to foreign judge-made rules, such as judgments and judicial opinions. On the contrary, the Court also consults contemporary foreign statutes, parliamentary reports, rules of evidence, and even police practices, most of which are not judge-made rules. *E.g. Roper,* 543 U.S. at 577–78 (discussion of British parliamentary reports and statutes); *Lawrence,* 539 U.S. at 572–73 (discussion of British parliamentary report and statute); New York v. Quarles, 467 U.S. 649, 673 n.6 (1984) (O'Connor, J., concurring) (discussion of British rules of evidence); Miranda v. Arizona, 384 U.S. 436, 488–89 (1966) (discussion of British, Indian, and Ceylon police practice).

[5] U.S. CONST. amend. VIII; *see Roper,* 543 U.S. at 575–78; *Atkins,* 536 U.S. at 316 n.21.

[6] U.S. CONST. amend. XIV, § 1; *see Lawrence,* 539 U.S. at 573, 576–77.

[7] Printz v. United States, 521 U.S. 898, 921 n.11 (1997).

[8] *See generally, e.g.*, Robert H. Bork, *Whose Constitution Is It, Anyway? Supreme Court Justices Are Importing Foreign Law, Signaling a Historic and Deplorable Shift,* NAT'L REV., Dec. 8, 2003, at 37.

[9] *See generally, e.g.*, Justice Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address at the 99th Annual Meeting of The American Society of International Law (Apr. 1, 2005), *in* 99 AM. SOC'Y INT'L L. PROC. 351 (2005)

publicans, upset with the Court's use of European legal materials to help expand privacy rights in *Lawrence* and restrict the death penalty in *Atkins* and *Roper,* have responded by introducing legislation to sharply restrict the Court's ability to cite foreign law.[10] Judicial conservatives, led by Justice Antonin Scalia, correctly point out that the Court has yet to clearly explain when and why contemporary foreign legal materials are relevant to interpreting the U.S. Constitution.[11] In particular, Justice Anthony Kennedy's sweeping, vague opinions in *Lawrence* and *Roper* have failed to do so.[12] As Justice Scalia notes, because the Court fails to tell us when foreign law is relevant and when it is not, there is no limiting principle that would prevent a future Court from one day citing contemporary foreign legal practices to restrict, rather than expand, domestic civil rights and civil liberties, particularly regarding free speech, criminal procedure, and abortion.[13]

The best way liberals can answer Justice Scalia is by articulating a clear theoretical rationale that explains when and why contemporary foreign legal materials are relevant to a principled, objective mode of constitutional interpretation. This Note attempts to do that. Part I provides a brief historical survey of the Court's shifting attitudes towards the relevance of contemporary foreign legal practice in modern constitutional law. This background demonstrates that the Court's use of foreign law is not the radically new phenomenon many conservatives believe it to be.

Part II begins by outlining Justice Scalia's legitimate concerns regarding the effect that *Atkins, Lawrence,* and *Roper* could have on national sovereignty and the rule of law. Part II continues by describing two theoretical rationales that might justify and limit the relevance of contemporary foreign legal practice to domestic constitutional interpretation and applies each to *Atkins, Lawrence,* and *Roper.* The first theory, advanced by Justice Stephen Breyer, is grounded in English com-

---

[10] H.R. Res. 97, 109th Cong. (2005); S. Res. 92, 109th Cong. (2005). These bills have attracted considerable support. The House legislation gathered 83 co-sponsors in the first session of the 109th Congress. *See* Library of Congress THOMAS, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:hr97ih.txt.pdf (last visited Apr. 11, 2006).

[11] *A Conversation Between U.S. Supreme Court Justices: The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia & Justice Stephen Breyer,* 3 INT'L J. CONST. LAW 519, 524–25 (Norman Dorsen ed. 2005) (comments of Justice Scalia) [hereinafter *Scalia-Breyer Discussion*].

[12] *See* Jeffrey Rosen, *Juvenile Logic,* NEW REPUBLIC, Mar. 21, 2005, at 11, 11 (describing Justice Kennedy's reasoning regarding the relevance of foreign law as "analytically sloppy and glib").

[13] Roper v. Simmons, 543 U.S. 551, 624–26 (2005) (Scalia, J., dissenting).

mon law. It suggests that, because some U.S. constitutional rules are codifications of English common law rules, U.S. courts may consult as informative, but non-binding, the legal experiences of British and former Commonwealth jurisdictions interpreting those same common law rules. A second theory, which the Court has never explicitly adopted, is grounded in customary international human rights law. It would justify the Court's use of foreign legal experience to determine whether a *jus cogens* norm applicable to the case exists and if it does, interpret the U.S. Constitution so as to reflect international standards.

Finally, Part III compares these two rationales and concludes that the customary international human rights law rationale provides a more reliable foundation for the future use of foreign law in domestic constitutional interpretation. By limiting its citation of foreign law in constitutional cases to a very limited range of cases involving empirically identifiable *jus cogens* norms, the Court could mollify some concerns that "activist judges" will use foreign law subjectively, expanding judicial discretion, and ultimately eroding U.S. cultural and legal sovereignty.

I. History and Background

While conservative critics of the Court's recent use of contemporary foreign legal materials in domestic constitutional interpretation describe this as an "alarming new trend,"[14] this is, in fact, not a novel phenomenon.[15] Several well-known twentieth century decisions consulted contemporary foreign practices and judgments in helping to determine the substantive content of domestic constitutional rules.[16]

---

[14] *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H. Res. 568 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 108th Cong. 1 (2004) (statement of Rep. Steve Chabot) [hereinafter *Appropriate Role of Foreign Judgments*].

[15] *Infra* notes 17–40 and accompanying text. "[T]he reliance on foreign or international law that we have seen in the recent cases is, in my view, consistent with our earliest legal traditions." *Appropriate Role of Foreign Judgments, supra* note 14, at 14 (statement of Vicki Jackson, Professor of Law, Georgetown Law Center).

[16] *See infra* notes 17–40 and accompanying text. It is still fair to say, however, that the Court does not consult foreign or international law in domestic constitutional interpretation nearly as often as its overseas counterparts. *See* Sarah K. Harding, *Comparative Reasoning and Judicial Review,* 28 Yale J. Int'l L. 409, 412 (2003). Harding contrasts the U.S. Supreme Court with the Supreme Court of Canada, which "consistently looks to the law of other nations for guidance and inspiration." *Id.* at 411.

A. *1937–1989*

In 1937, Justice Benjamin N. Cardozo consulted foreign legal practices in *Palko v. Connecticut*,[17] which considered whether the Fifth Amendment's Double Jeopardy Clause should be made applicable to the States through the Fourteenth Amendment.[18] Cardozo reasoned that immunity from self-incrimination and double jeopardy protection were not rights sufficiently fundamental to be protected by the Fourteenth Amendment because they were not "of the very essence of a scheme of ordered liberty . . . [and] justice . . . would not perish" if they were abolished.[19] To support his conclusion, Cardozo pointed to contemporary foreign experience: "Compulsory self-incrimination is part of the established procedure in the law of Continental Europe."[20]

In 1958, the Court extended this methodology to Eighth Amendment jurisprudence in *Trop v. Dulles*,[21] which held that the Court should draw its meaning of the phrase "cruel and unusual punishments" from "the evolving standards of decency that mark the progress of a maturing society."[22] This opaque language suggested that this "maturing society" could be either global or American.[23] The Court held that the Eighth Amendment prohibits the penalty of forfeiture of citizenship because, *inter alia*, "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."[24] In subsequent cases, the Court again pointed to foreign legal practice as cognizable evidence of evolving standards of decency regarding application of the death penalty to defendants convicted of felony-murder[25] and rape of an adult woman.[26]

A survey of contemporary foreign legal practices also figured prominently in *Miranda v. Arizona*,[27] which famously held that the Fifth

---

[17] 302 U.S. 319 (1937).

[18] *Id.* at 322.

[19] *Id.* at 325, 326. This holding, first announced in *Twining v. New Jersey*, 211 U.S. 78, 106, 111, 112 (1908), has since been overruled by *Benton v. Maryland*, 395 U.S. 784, 796 (1969).

[20] *Palko*, 302 U.S. at 326 n.3.

[21] 356 U.S. 86 (1958) (plurality opinion).

[22] *Id.* at 101.

[23] Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization":* Lawrence *and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 Ohio St. L.J. 1283, 1293 (2004); *see* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 Harv. L. Rev. 148, 148–49 (2005).

[24] *Trop*, 356 U.S. at 102.

[25] Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982).

[26] Coker v. Georgia, 433 U.S. 584, 596 n.10, 600 (1977).

[27] 384 U.S. 436 (1966).

Amendment prohibited admission of statements obtained from defendants during incommunicado interrogation without full prior warning of their constitutional rights.[28] After announcing the new constitutional rule,[29] Chief Justice Earl Warren addressed the dissenters' concern that "society's need for interrogation outweighs the privilege."[30] Surveying the current state of police interrogation practice in England, Scotland, India, and Ceylon, the Chief Justice concluded that "[t]he experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed."[31] Warren then asserted, referring to those former Commonwealth jurisdictions: "Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described."[32] This intriguing sentence implies that foreign legal standards somehow compelled the Court to interpret the Fifth Amendment in the manner that it did.[33]

The Burger Court then referred to foreign legal practice in justifying its subsequent curtailment of constitutional protections for criminal defendants.[34] *New York v. Quarles*[35] significantly restricted the scope of *Miranda*'s exclusionary rule by holding that, in a situation where a police officer asks a suspect questions reasonably prompted by a concern for public safety, there exists an exception to the requirement that police officers give that suspect *Miranda* warnings.[36] In a concurring opinion, Justice Sandra Day O'Connor rejected this "public safety" exception[37] but reached the same judgment as the majority by reasoning that *Miranda*'s exclusionary rule did not mandate the suppression of nontestimonial evidence, in this case, the defendant's gun.[38] O'Connor argued that, "[t]he learning of these countries [England, India, Scotland, and Ceylon] was important to development of the initial *Miranda* rule. It therefore should be of equal

---

[28] *Id.* at 478–79.

[29] *Id.* The long-running controversy over whether *Miranda* announced a constitutional rule as opposed to a judge-made rule of evidence was finally settled in *Dickerson v. United States,* 530 U.S. 428, 438 (2000). Holding that *Miranda* was in fact interpreting what the Fifth Amendment required, *Dickerson* noted that *Miranda* was replete with language suggesting so. *Id.* at 439.

[30] *Miranda,* 384 U.S. at 479.

[31] *Id.* at 486.

[32] *Id.* at 489.

[33] *See id.*

[34] *See* New York v. Quarles, 467 U.S. 649, 673–74 (1984) (O'Connor, J., concurring).

[35] 467 U.S. 649 (1984).

[36] *Id.* at 655–56.

[37] *Id.* at 660 (O'Connor, J., concurring).

[38] *Id.* at 673–74.

importance in establishing the scope of the *Miranda* exclusionary rule today."[39] Justice O'Connor then wrote: "Interestingly, the trend in these other countries is to admit the improperly obtained statements themselves, if nontestimonial evidence later corroborates, in whole or in part, the admission."[40]

B. *1989–2002*

In the late 1980s, two events set the stage for a conflict in the Court regarding the appropriate role of contemporary foreign legal practice in domestic constitutional interpretation. First, as most industrialized democracies sharply restricted or abolished capital punishment, death row inmates increasingly asked the Court to look abroad in considering whether their sentences offended evolving standards of decency.[41] Second, Justice Scalia joined the Court.[42] Justice Scalia quickly established himself as a vociferous and influential critic of the use of contemporary foreign legal practice in domestic constitutional interpretation.[43]

In 1989, Justice Scalia authored the majority opinion in *Stanford v. Kentucky*,[44] which held that the execution of a defendant convicted of a crime at sixteen or seventeen years of age did not violate evolving standards of decency and was therefore constitutional.[45] Justice Scalia dismissed evidence that Western European legal systems would not authorize juvenile execution as irrelevant dicta.[46] He countered that, "*American* conceptions of decency . . . are dispositive" in Eighth Amendment jurisprudence.[47] This represented a significant departure from precedent.[48] In a similar juvenile death penalty case decided only a year earlier, the Court had mentioned European legal practices as cognizable evidence of evolving standards of decency.[49]

---

[39] *Id.* at 672.

[40] New York v. Quarles, 467 U.S. 649, 673 n.6 (1984) (O'Connor, J., concurring).

[41] *E.g.*, Stanford v. Kentucky, 492 U.S. 361, 389–90 (1989) (Brennan, J., dissenting); Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988).

[42] Justice Scalia took his seat on September 26, 1986. SUPREME COURT OF THE U.S., THE JUSTICES OF THE SUPREME COURT, at 1, *available at* http://www.supremecourtus.gov/about/biographiescurrent.pdf (last visited Apr. 11, 2006).

[43] *See Stanford*, 492 U.S. at 369 n.1 (1989).

[44] 492 U.S. 361 (1989).

[45] *Id.* at 380.

[46] *Id.* at 370 n.1.

[47] *Id.*

[48] *See* Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988).

[49] *Id.* "The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the

In death penalty cases in 1999 and 2002, Justice Scalia's views again prevailed.[50] In *Knight v. Florida,*[51] the Court refused to consider whether the execution of an inmate who had sat on death row for nearly twenty years constituted "cruel and unusual punishment."[52] To prove that there was an international consensus against the practice, the petitioner in *Knight* pointed to recent decisions from the U.K. Privy Council and European Court of Human Rights, both holding that execution following prolonged delay and multiple execution warrants could rise to the level of torture and inhumane treatment.[53] While Justice Breyer found the reasoning from these and similar foreign decisions from Zimbabwe and India highly informative of what constitutes "cruel and unusual punishment,"[54] Justice Clarence Thomas rejected their relevance.[55] Two years later, the Court again denied the relevance of foreign law in a similar death row delay case.[56]

In 1995, Justice Scalia authored his second majority opinion that held that contemporary foreign legal experience is irrelevant in interpreting the U.S. Constitution.[57] In *Printz v. United States,*[58] which held that a federal gun control statute unconstitutionally imposed obligations on state officers to execute federal laws, Justice Scalia rebuked Justice Breyer for discussing the benefits that the European Union real-

---

views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community." *Id.*

[50] *See* Foster v. Florida, 123 S. Ct. 470, 470–71 (2002) (Thomas, J., concurring in denial of cert.); Knight v. Florida, 120 S. Ct. 459, 459 (1999) (Thomas, J., concurring in denial of cert.).

[51] 120 S. Ct. 459 (1999) (denial of cert.).

[52] *Id.* at 459, 461 (Breyer, J., dissenting from denial of cert.).

[53] *Knight,* 120 S. Ct. at 462 (Breyer, J., dissenting from denial of cert.) (citing Pratt v. Attorney-General for Jamaica, [1994] 2 A.C. 1, 29, 33 (P.C. 1993) and Soering v. United Kingdom, 11 Eur. Ct. H.R. Rep. 439, 478, ¶ 111 (1989)). *Pratt* unanimously held that the execution of two inmates who had been on death row for fourteen years and who had been read execution warrants on three separate occasions would constitute "torture or . . . inhuman and degrading punishment" in violation of Section 17(1) of the Jamaican Constitution. *See Pratt,* [1994] 2 A.C. at 29, 33. *Soering* held that extradition from Europe to Virginia of a man charged with capital murder would violate Article 3 of the European Human Rights Convention Charter because Virginia's protracted delays in carrying out death sentences, which averaged six to eight years, constituted inhumane and degrading punishment. *Soering,* 11 Eur. Ct. H.R. Rep. at 478, ¶ 111.

[54] *Knight,* 120 S. Ct. at 462–64 (Breyer, J., dissenting from denial of cert.).

[55] *Id.* at 459 (Thomas, J., concurring in denial of cert.).

[56] Foster v. Florida, 123 S. Ct. 470, 470 n.* (2002) (Thomas, J., concurring in denial of cert.).

[57] Printz v. United States, 521 U.S. 898, 921 n.11 (1997).

[58] 521 U.S. 898 (1997).

ized from commandeering: "We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one . . . . The fact is that our federalism is not Europe's."[59]

C. *2002–2005*

Three cases since 2002 have signaled a decisive shift away from Justice Scalia's position. *Atkins, Lawrence,* and *Roper* all used contemporary foreign legal experience as interpretive aides in major decisions that significantly expanded the substantive scope of the Eighth and Fourteenth Amendments' protections for criminal defendants.[60] Each decision drew a successively more defiant dissent from Justice Scalia.[61]

Atkins held that the execution of mentally retarded defendants is unconstitutionally "cruel and unusual punishment," finding that a "national consensus" had emerged against the practice since the Court last examined the issue thirteen years ago.[62] Justice John Paul Stevens then wrote in a passing footnote that "the world community" also overwhelmingly disapproved of the execution of mentally retarded offenders.[63] He stated that "[a]lthough these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue."[64]

In his dissenting opinion, Justice Scalia skewered this discussion of international law:

> But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of . . . members of the so-called "world community," . . . . [I]rrelevant are the practices

---

[59] *Id.* at 921 n.11. Breyer defended himself: "Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their system and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . . ." *Id.* at 977 (Breyer, J., dissenting) (citations omitted).

[60] Roper v. Simmons, 543 U.S. 551, 575-78 (2005); Lawrence v. Texas, 539 U.S. 558, 573, 576–77 (2003); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

[61] *Roper,* 543 U.S. at 622–28 (Scalia, J., dissenting); *Lawrence,* 539 U.S. at 598 (Scalia, J., dissenting); *Atkins,* 536 U.S. at 347–48 (Scalia, J., dissenting).

[62] 536 U.S. at 316, 321.

[63] *Id.* at 316 n.21.

[64] *Id.*

> of the "world community," whose notions of justice are (thankfully) not always those of our people.[65]

One year later, *Lawrence* held that the liberty and privacy interests protected by the Fourteenth Amendment's substantive due process clause extended to homosexuals engaging in private, consensual, intimate conduct,[66] overruling its previous decision in *Bowers v. Hardwick*.[67] Justice Kennedy's majority opinion began by attacking *Bowers*'s premise that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization."[68] In response, Justice Kennedy noted that scores of U.S. states had either abolished or ceased to enforce their criminal prohibitions on private consensual same-sex sodomy, and that:

> Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. . . . The court held that the laws proscribing the [homosexual] conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom,* 45 Eur. Ct. H.R. (1981) ¶ 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.[69]

Justice Kennedy's use of *Dudgeon* was not narrowly limited to overruling *Bowers*'s historical assumptions but also its essential reasoning and "central holding."[70] Referring to the experience of Western European nations, he argued that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[71] *Lawrence* made no mention of the reasoning behind *Dudgeon,* only its result.[72] The mere existence of this European judgment, its acceptance among many nations, and the fac-

---

[65] *Atkins,* 536 U.S. at 347–48 (Scalia, J., dissenting) (citations omitted).
[66] *Lawrence,* 539 U.S. at 578.
[67] Bowers v. Hardwick, 478 U.S. 186 (1986).
[68] *Lawrence,* 539 U.S. at 571 (quoting *Bowers,* 478 U.S. at 196).
[69] *Id.* at 573.
[70] *See id.* at 575, 576–77.
[71] *Id.* at 577.
[72] Larsen, *supra* note 23, at 1296–97.

tual similarities between it and *Lawrence*, appeared to make it a legitimate aide in interpreting the proper scope of the substantive due process clause.[73]

Justice Scalia furiously dissented from every aspect of *Lawrence,* including the relevance of contemporary European legal practice to interpreting the substantive due process clause:

> Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. . . . The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans."[74]

In 2005, Justice Kennedy's majority opinion in *Roper* represented a further extension of this methodology and a direct challenge to Justice Scalia.[75] *Roper* overruled Justice Scalia's decision in *Stanford* and held that the death penalty cannot be imposed on offenders who were under eighteen years of age at the time of their capital crimes, citing a "national consensus" that had emerged since 1989.[76] While not essential to his factual finding that this national consensus existed and therefore technically dicta, Justice Kennedy again pointed to foreign, particularly British, law and international materials, including treaties that the U.S. Senate has not ratified, as "instructive for [the Court's] interpretation of the Eighth Amendment."[77] Comparison to foreign jurisdictions demonstrated "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[78] Justice Kennedy then argued that "[t]he opinion of the world community, while not controlling our

---

[73] *Id.*

[74] *Lawrence,* 539 U.S. at 598 (Scalia, J., dissenting) (citing Foster v. Florida, 123 S. Ct. 470, 470 n. (2002) (Thomas, J., concurring in denial of cert.)).

[75] Roper v. Simmons, 543 U.S. 551, 575–78 (2005).

[76] *Id.* at 564–67.

[77] *Id.* at 575–78.

[78] *Id.* at 575. Scalia rejects the notion that foreign views can be relevant to "confirming" a national consensus. *Id.* at 627 n.9 (Scalia, J., dissenting). He writes that "[e]ither America's principles are its own, or they follow the world; one cannot have it both ways." *Id.*

outcome, does provide respected and significant confirmation for our own conclusions."[79] Anticipating Justice Scalia's dissent, Justice Kennedy wrote: "[I]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our heritage of freedom."[80]

D. *The Current State of the Law*

The Court's vacillations regarding the relevance of contemporary foreign legal practices in domestic constitutional interpretation have produced a confusing jumble of precedent, pro and con.[81] At bare minimum, *Atkins* and *Roper* clearly hold that foreign experience is instructive in determining the "evolving standards of decency" that guide Eighth Amendment jurisprudence.[82] In substantive due process analysis, *Lawrence* and *Palko* both can be seen as standing for the proposition that contemporary foreign legal practices and judgments may also inform the Court's determination of which rights are sufficiently fundamental to be protected by the Fourteenth Amendment.[83] *Miranda* and *Quarles* are also still good law, and both suggest that it is proper to consider the experience of other members of Anglo-American common law community in defining the substantive scope of the Fifth Amendment's Self-Incrimination Clause.[84] *Printz* is the only one of Justice Scalia's majority opinions that clearly rejects the use of foreign law in interpreting the U.S. Constitution that is still good law.[85] One could infer from this that the Court is willing to consider contemporary foreign legal experience in interpreting the scope of the Constitution's protections of individual rights but not cases concerning separation of powers and federalism.[86] That may now be the black letter law in this area, but it is unclear whether the Court itself intended such a result.

---

[79] *Roper*, 543 U.S. at 578.

[80] *Id.*

[81] *Compare Roper,* 543 U.S. at 578, *with* Printz v. United States, 521 U.S. 898, 921 n.11 (1997).

[82] *Roper,* 543 U.S. at 575-78; Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

[83] *See* Lawrence v. Texas, 539 U.S. 558, 573, 576–77 (2003); Palko v. Connecticut, 302 U.S. 319, at 326 n.3 (1937).

[84] *See* New York v. Quarles, 467 U.S. 649, 673–74 (1984) (O'Connor, J., concurring); Miranda v. Arizona, 384 U.S. 436, 488–89 (1966).

[85] *Printz,* 521 U.S. at 921 n.11.

[86] *See supra* notes 81–85 and accompanying text.

That is why it is necessary for the Court to re-consider the theoretical rationale for this methodology.

II. Discussion

A. *Justice Scalia's View: Foreign Materials Can Never Be Relevant to Domestic Constitutional Interpretation*

As an originalist, Justice Scalia believes that "modern foreign legal materials can *never* be relevant to an interpretation of—to the *meaning* of—the U.S. Constitution."[87] *Old* foreign legal materials, particularly from England, may be relevant to understanding the original intent of the archaic words and phrases in the Constitution.[88] Justice Scalia's main problem with citing modern foreign law "is not so much that the law is foreign, but that it is modern."[89] Beyond this originalist critique, Justice Scalia also objects that this methodology has the potential to undermine both the rule of law and national sovereignty.[90]

1. Cultural Sovereignty

Conservative critics argue that contemporary foreign legal materials are not appropriate interpretive aides because they reflect foreign legal cultures that may differ significantly from our own.[91] For example, Justice Scalia believes that Justice Breyer's references in *Knight* and *Foster* to English and Jamaican judgments holding that extensive delay in executing a death sentence renders the punishment cruel and unusual are irrelevant to interpreting our own constitution, because England and Jamaica lack the extensive habeas corpus appeals available to U.S. defendants.[92] In the United States, lengthy delays in execution are caused by the defendants' appeals, rather than solely because of government action, as in Jamaica.[93]

---

[87] Scalia, *supra* note 4, at 307. Some jurists attempt to defend the use of foreign materials from an originalist perspective. *See* Ginsburg, *supra* note 9, at 352. Justice Ginsburg argues: "The drafters and signers of the Declaration of Independence cared about the opinions of other peoples . . . . The Declarants stated their reasons [for independence] 'out of a decent Respect to the Opinions of Mankind.'" *Id.*

[88] *See* Scalia, *supra* note 4, at 306.

[89] Michael C. Dorf, *The Use of Foreign Law in American Constitutional Interpretation: A Revealing Colloquy Between Justices Scalia and Breyer,* FindLaw's Writ, Jan. 19, 2005, http://writ.findlaw.com/dorf/20050119.html.

[90] *See* Roper v. Simmons, 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting).

[91] *See* Foster v. Florida, 123 S. Ct. 470, 470 n. (2002) (Thomas, J., concurring in denial of cert.).

[92] *See Scalia-Breyer Discussion, supra* note 11, at 528–29 (comments by Justice Scalia).

[93] *See id.*

In *Roper,* he similarly attacked the Court's "special reliance on the laws of the United Kingdom . . . . a country that has developed, in the centuries since the Revolutionary War—and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental jurists—a legal, political, and social culture quite different from our own."[94]

2. Threat of Restricting Domestic Civil Rights

Critics of the Court's methodology point out that the use of foreign law is a two-way street; so long as the Court deems it relevant to all cases interpreting the Constitution, it can also be used to restrict the scope of constitutional rights in the United States.[95] The United States has a unique constitutional jurisprudence, whose precepts are now deeply embedded in American culture.[96] The United States affords its citizens uniquely extensive protections in the areas of criminal procedure, free speech, defamation, separation of church and state, and reproductive rights.[97] Justice Scalia noted in *Roper* that the Court has never considered foreign views in interpreting the First Amendment or the Sixth Amendment, though it has articulated no clear reason why those views should not be taken into consideration.[98] In his words, the Court does not take its own directive seriously.[99]

3. Increased Judicial Discretion

Justice Scalia also argues that the Court's inconsistent use of contemporary foreign legal experience undermines the rule of law because, by expanding the universe of law that judges can apply to any particular set of facts, the ultimate disposition of the case becomes less predictable and more likely to vary from judge to judge.[100] He writes: "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry."[101] What particularly irks Justice Scalia is that the Court has mentioned foreign legal experience in cases concerning the rights of ho-

---

[94] 543 U.S. at 626–27 (Scalia, J., dissenting).
[95] *See id.* at 624–26.
[96] *See id.*
[97] *Id.*
[98] *See id.* at 624–25.
[99] Roper v. Simmons, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting).
[100] Scalia, *supra* note 4, at 309.
[101] *Roper,* 543 U.S. at 627 (Scalia, J., dissenting).

mosexuals but not abortion cases, despite the fact that both are interpreting the same substantive due process clause.[102]

B. *Justice Breyer's View: Contemporary Materials from the Anglo-American Common Law Community Can Be Relevant to Constitutional Interpretation*

Justice Breyer has a different view, implicitly arguing that the Court can justifiably consult the contemporary experiences of British and former Commonwealth jurisdictions if and when it interprets constitutional rules that have their origins in English common law.[103] Several provisions of the U.S. Constitution represent codifications of important principles of English common law as they existed in 1789.[104] For example, the Eighth Amendment prohibition against "cruel and unusual punishments" was taken almost verbatim from Section 10 of the English Declaration of Rights of 1689, which provided "[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted."[105] The Fifth Amendment rule regarding the admission of coerced confessions also traces its origins back to a standard of English common law at the time of the Constitution.[106]

Many other common law nations have laws regarding cruel and unusual punishment and the privilege against self-incrimination that are derived from the same common law that is reflected in the Eighth Amendment[107] and the Fifth Amendment.[108] Given these historical and

---

[102] *See id.* at 625-26.

[103] *See* Foster v. Florida, 123 S. Ct. 470, 472 (2002) (Breyer, J., dissenting from denial of cert.); Knight v. Florida, 120 S. Ct. 459, 462-63 (1999) (Breyer, J., dissenting from denial of cert.). In practice, however, Justice Breyer has not limited his use of foreign law to materials from within the Anglo-American common law community. *See, e.g.*, Printz v. United States, 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting) (citing Swiss, German, and European Union experience).

[104] *See* Dickerson v. United States, 530 U.S. 428, 433 (2000); Harmelin v. Michigan, 501 U.S. 957, 966 (1991).

[105] *See Harmelin*, 501 U.S. at 966.

[106] *See Dickerson*, 530 U.S. at 433.

[107] The textual similarities between the Eighth Amendment and similar prohibitions in the constitutions of former Commonwealth jurisdictions are evidence that they share a common historic ancestor in the English Bill of Rights of 1689. *See, e.g.*, CAN. CONST. pt. I, § 12 ("Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."); JAM. CONST. ch. III, § 17(1) ("No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."); ZIMB. CONST. ch. III, § 15(1) ("No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.").

[108] *See* Jeffrey K. Walker, *A Comparative Discussion of the Privilege Against Self-Incrimination*, 14 N.Y. L. SCH. J. INT'L & COMP. L. 1, 6, 12, 14, 19 (1993) (describing how U.S., English,

textual connections, when a U.S. court is presented with a difficult or novel question concerning the proper interpretation of the Eighth Amendment or Fifth Amendment Self-Incrimination Clause, it might consult, for example, the judgments of English, Canadian, and Indian courts that wrestled with similar questions.[109] This common law dialogue among jurists would resemble what U.S. state supreme courts do when they look at decisions from neighboring states regarding common law principles of property, contracts, and torts as informative but non-binding guides.[110] Under this approach, the relevance of the foreign rule to domestic constitutional interpretation is always non-binding; it depends upon the depth of its reasoning rather than simply its result.[111]

Justice Breyer's well-reasoned dissents in *Knight* and *Foster* provide an illustration of this methodology at work.[112] In considering whether the execution of a defendant after he had sat on death row for nearly twenty years constituted cruel and unusual punishment, Justice Breyer compared and contrasted judgments from common law courts—including England, Jamaica, Canada, and Zimbabwe—that were also interpreting constitutions that banned "torture or . . . inhuman or degrading punishment."[113] Most reasoned that the "suffering inherent in a prolonged wait for execution" undermined the sentence's basic retributivist or deterrent purpose, making the subsequent execution unconstitutionally disproportionate punishment.[114] Justice Breyer noted that these decisions were "relevant and informative" precisely because these common law jurisdictions were applying "standards roughly comparable to our own constitutional standards," which all derived from a common ancestor.[115] Some lower federal courts follow this comparative

---

Canadian, and Indian rules regarding the privilege against self-incrimination share common historical origins).

[109] *See, e.g.,* Knight v. Florida, 120 S. Ct. 459, 462-63 (1999) (Breyer, J., dissenting from denial of cert.).

[110] *See Appropriate Role of Foreign Judgments, supra* note 14, at 54–55 (testimony of Prof. Vicki Jackson).

[111] *See Scalia-Breyer Discussion, supra* note 11, at 523 (comments of Justice Breyer). This use contrasts with the "moral fact-finding" approach criticized by Professor Larsen, where foreign rules are treated as relevant irrespective of the reasoning behind the rule. *See* Larsen, *supra* note 23, at 1295–96.

[112] *See* Foster v. Florida, 123 S. Ct. 470, 472 (2002) (Breyer, J., dissenting from denial of cert.); *Knight,* 120 S. Ct. at 462–63 (Breyer, J., dissenting from denial of cert.).

[113] *Knight,* 120 S. Ct. at 463 (Breyer, J., dissenting from denial of cert.).

[114] *See id.* at 462.

[115] *Id.* at 463–64; *see also Foster,* 123 S.Ct. at 472 (Breyer, J., dissenting from denial of cert.)

common law rationale in post-*Lawrence* decisions that use contemporary foreign legal practice as an aide in interpreting the scope of the Eighth Amendment[116] and the Fifth Amendment's Self-Incrimination Clause.[117]

1. Application to *Atkins*

This common law theory of comparative constitutional law would not justify the Court's use of foreign legal materials in *Atkins*.[118] *Atkins* cited to legal practice and opinion in the "world community" writ large, with no special emphasis on common law jurisdictions.[119] Justice Stevens took no account of the reasons why foreign legal courts and legislatures rejected execution of the mentally retarded; the foreign rules were relevant because of their results, not their reasoning.[120]

2. Application to *Lawrence*

Justice Kennedy's opinion in *Lawrence* did focus on British legal experience, including parliamentary reports and acts, in informing his interpretation of the scope of the Fourteenth Amendment's substantive due process clause.[121] *Lawrence* primarily relied, however, on a decision from the European Court of Human Rights rather than a British court.[122] Further, the European Court was interpreting a document, the European Convention on Human Rights, which postdates the Fourteenth Amendment by almost a century and whose operative language differs significantly.[123] The respective rights to privacy protected by the Fourteenth Amendment and European Convention on Human Rights

---

[116] *See, e.g.,* United States v. Sampson, 275 F. Supp. 2d 49, 65–66, 83–84 (D. Mass. 2003) (discussing English experience with the death penalty in considering defendant's claim that the Federal Death Penalty Act violates the Eighth Amendment).

[117] *See, e.g.,* United States v. Sasson, 334 F. Supp. 2d 347, 373–75 (E.D.N.Y. 2004) (discussing English judgments regarding the admissibility of evidence found as a result of compelled self-incrimination in interpreting the scope of the *Miranda* exclusionary rule).

[118] *See* 536 U.S. 304, 316 n.21 (2002).

[119] *Id.*

[120] *See* Larsen, *supra* note 23, at 1295–96, 1296 n.59.

[121] 539 U.S. 558, 572–73 (2002).

[122] Dudgeon v. United Kingdom, 3 Eur. Ct. H.R. Rep. 40, 54, ¶ 97 (1980) (cited in *Lawrence,* 539 U.S. at 573, 576–77).

[123] *See id.* The text of Article 8(1) of the European Convention on Human Rights is far more explicit about announcing a right to privacy than is the text of Fourteenth Amendment to the U.S. Constitution. *Compare* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8(1), Eur. T.S. 5 ("Everyone has the right to respect for his private and family life . . . ."), *with* U.S. CONST. amend. XIV § 1 (no state shall "deprive any person of life, liberty, or property, without due process of law").

do not share a common law ancestor.[124] Justice Kennedy's use of foreign law is also inconsistent with this theory of common law dialogue because it did not make the relevance of the legal rule contingent on the strength of its reasoning.[125] Justice Kennedy did not mention the reasoning behind *Dudgeon,* assuming that the "human freedom" protected by Article 8(1) of the European Convention on Human Rights was interchangeable with the liberty protected by the Fourteenth Amendment's substantive due process clause.[126] However desirable Justice Kennedy's decision was on the merits, his use of foreign legal materials as an interpretive aide was unsupported by a common law theory of comparative constitutional law.[127]

3. Application to *Roper*

Justice Kennedy adopted this comparative common law approach more explicitly in *Roper,* again placing particular emphasis on British materials.[128] He argued: "[T]he United Kingdom experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins."[129] Justice Kennedy mentioned the Eighth Amendment's ancestor, the English Declaration of Rights of 1689, and discussed how the U.K. recognized the disproportionate punishment inherent in the juvenile death penalty and abolished it in 1948.[130] Implicitly, Justice Kennedy seemed to be reasoning that the British interpretation of what constitutes "cruel and unusual punishment," reflected in its parliamentary acts and government policies, was a well-reasoned rule that could represent a similarly sensible interpretation of the parallel American rule.[131]

---

[124] *Compare* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8(1), Eur. T.S. 5 ("Everyone has the right to respect for his private and family life . . . ."), *with* U.S. CONST. amend. XIV § 1 (no state shall "deprive any person of life, liberty, or property, without due process of law"). Substantive due process, unlike procedural due process, has only a tenuous historical connection to the common law reflected in the Magna Carta's *per legem terrae. See* Hurtado v. People of California, 110 U.S. 516, 531–32 (1884).

[125] *See* Larsen, *supra* note 23, at 1297.

[126] *See Lawrence,* 539 U.S. at 573, 576–77.

[127] *See supra* notes 121–26 and accompanying text.

[128] *See* 543 U.S. 1183, 1199–1200 (2005).

[129] *Id.* at 1199.

[130] *Id.* at 1199–1200.

[131] *See id.* Justice Kennedy generally refers to British statutes and practices, while Justice Breyer generally refers to British judge-made rules. *See* Roper v. Simmons, 543 U.S. 551, 577–78 (Justice Kennedy's discussion of British parliamentary reports and statutes); Lawrence v. Texas, 539 U.S. 558, 572–73 (Kennedy's discussion of British parliamentary report

C. *An Alternative View:* Jus Cogens *and Constitutional Interpretation*

A second, far more politically controversial theory that could justify the Court's recent use of contemporary foreign legal practice is grounded in the doctrine of customary international human rights law.[132] In 1900, the Court held in *The Paquete Habana*[133] that, "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[134] *Paquete Habana* also recognized that a rule of international law can become binding through the "customs and usages of civilized nations."[135] A norm crystallizes into a rule of customary international law when there is sufficient state practice consistent with it and *opinio juris,* meaning states follow the practice from a sense of legal obligation.[136]

As *Paquete Habana* suggests, however, customary international law is part of U.S. law only to a very limited extent.[137] *Paquete Habana*'s holding only applies to a fact pattern to which no controlling U.S. executive, legislative, or judicial act can be applied, which in that case involved a foreign fishing vessel seized in international waters as a prize of war.[138] In contrast, when a U.S. statute controls the facts of the case, federal courts have held that customary international law cannot supplant that domestic law.[139]

---

and statute); Knight v. Florida, 120 S. Ct. 459, 462-63 (1999) (Breyer, J., dissenting from denial of cert.) (Justice Breyer's discussion of British and Commonwealth judicial opinions). To a judge using this comparative common law approach, foreign statutes are less useful than foreign judgments because they are rarely accompanied by readily discernable reasoning. *See id.*

[132] *See generally* Ken I. Kersch, *Multilateralism Comes to the Courts,* 154 Pub. Int. 3 (2004) (a conservative criticism of applying customary international human rights law in the federal courts).

[133] 175 U.S. 677 (1900).

[134] *Id.* at 700.

[135] *Id.*

[136] *See* Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1031, T.S. No. 993 (referring to "international custom, as evidence of a general practice accepted as law"); Restatement (Third) of Foreign Relations Law of the U.S. § 102(2) (1987) [hereinafter Foreign Relations Restatement] ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

[137] 175 U.S. at 700.

[138] *Id.*

[139] Munoz v. Ashcroft, 339 F.3d 950, 958 (9th Cir. 2003); United States v. Yousef, 327 F.3d 56, 93 (2d Cir. 2003).

Federal appellate courts hold that only in rare situations when a rule of customary international law has ripened into a *jus cogens* norm does it enjoy nonderogable and peremptory status such that it could trump U.S. law.[140] The concept of a *jus cogens* peremptory norm is difficult to describe.[141] Article 53 of the Vienna Convention on the Law of Treaties defines it somewhat tautologically: "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . . ."[142] U.S. federal courts recognize the universal nature of *jus cogens,* which "embraces customary laws considered binding on all nations" and "is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations."[143] In other words, a *jus cogens* norm differs from a mere rule of customary international law in that it enjoys near universal acceptance.[144] Basic rules of international human rights law that protect the intrinsic dignity of the human person enjoy such status.[145]

Jus cogens doctrine could justify the use of contemporary foreign legal practice in interpreting the Eighth Amendment.[146] Federal case law and the American Law Institute's *Restatement (Third) of Foreign Relations Law* state that prohibitions against official torture and cruel and

---

[140] *Cf.* United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (citing Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939–40 (D.C. Cir. 1988)) (holding that the kidnapping of a defendant by government agents in Honduras for purposes of bringing defendant to the United States to face trial was not justiciable in federal court because it did not violate a recognized U.S. constitutional or statutory provision or a *jus cogens* norm, given that the prohibition against kidnapping does not qualify as a *jus cogens* norm); *see also* Foreign Relations Restatement, *supra* note 136, at § 102 cmt. k.

[141] *See* Karen Parker & Lyn Beth Neylon, Jus Cogens*: Compelling the Law of Human Rights,* 12 Hastings Int'l & Comp. L. Rev. 411, 414 (1989).

[142] Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331.

[143] Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (citing David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts,* 13 Yale J. Int'l L. 332, 350–51 (1988)).

[144] *See id.*

[145] *See* Foreign Relations Restatement, *supra* note 136, at § 702 cmt. n. These include protections against genocide, slavery, torture, and state-sponsored murder. *Id.*

[146] *See, e.g.,* Geoffrey Sawyer, Comment, *The Death Penalty Is Dead Wrong: Jus Cogens Norms and the Evolving Standard of Decency,* 22 Penn St. Int'l L. Rev. 459, 481 (2004); Kha Q. Nguyen, Note, *In Defense of the Child: A Jus Cogens Approach to the Capital Punishment of Juveniles in the United States,* 28 Geo. Wash. J. Int'l L. & Econ. 401, 436 (1995).

unusual punishment enjoy *jus cogens* status.[147] Because these nonderogable prohibitions are binding on all states, and the responsibility to follow them are obligations *erga omnes,*[148] it makes sense that the United States must interpret its own constitutional prohibition against "cruel and unusual punishment" so as to afford its citizens at least as much protections as *jus cogens* norms demand.[149] The Court's "evolving standards of decency" jurisprudence already embodies the natural law concept of *jus cogens* and recognizes the Eighth Amendment as a human rights law: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . ."[150]

Jus cogens might also play a legitimate role in interpreting the scope of the due process clause in cases involving arbitrary detention or abusive interrogation techniques.[151] The Fourteenth Amendment already prohibits state law enforcement conduct that "shocks the conscience" or interferes with rights "implicit in the concept of ordered liberty."[152] Like the "evolving standards of decency" test in Eighth Amendment jurisprudence, this broad, universal language seems to allow room for a consideration of foreign views.[153] Therefore, in an unusual case where the arbitrary detention or torture of a party did not violate a recognized U.S. constitutional or statutory provision but nonetheless fell below universally accepted human rights standards, the Court might reinterpret the Fourteenth Amendment "up" so that it at least reflect *jus cogens* norms.[154] It is likely that such a case could soon come before the

---

[147] *Blake,* 965 F.2d at 717; Foreign Relations Restatement, *supra* note 136, at § 702 cmt. n; *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) (referring to the ban on official torture as "part of customary international law").

[148] *See* Foreign Relations Restatement, *supra* note 136, at § 702 cmt. o.

[149] *See* Nugyen, *supra* note 146, at 437–38; *see also* Viktor Mayer-Schönberger & Teree E. Foster, *More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law,* 18 B.C. Int'l & Comp. L. Rev. 59, 90 (1995) (proposing *jus cogens* as "a constitutional interpretive device" for the First Amendment); Parker & Neylon, *supra* note 141, at 457 (arguing that the U.S. Supreme Court has been "using *jus cogens* analysis, though not the term '*jus cogens*'" in interpreting the Fourteenth Amendment).

[150] Atkins v. Virginia, 536 U.S. 304, 311 (2002) (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

[151] *See* Foreign Relations Restatement, *supra* note 136, at § 702(e) (recognizing the prohibition against state practice or encouragement of "prolonged arbitrary detention" as a *jus cogens* norm).

[152] *See* Chavez v. Martinez, 538 U.S. 760, 787 (2003) (citing Rochin v. California, 342 U.S. 165, 172 (1952)); Palko v. Connecticut, 302 U.S. 319, 325–26 (1937).

[153] *See Chavez,* 538 U.S. at 787; *Palko,* 302 U.S. at 325-26.

[154] *See* Foreign Relations Restatement, *supra* note 136, at § 702(e); *cf. Palko,* 302 U.S. at 325–26 (considering foreign legal practice but refusing to reinterpret the Fourteenth Amendment "up" where the existing U.S. constitutional rule concerning double jeopardy did not fall below international human rights standards).

Court because, as the U.S. legal system increasingly condones interrogation techniques that its European counterparts would not, there is a greater possibility that U.S. constitutional rules regarding torture may afford detainees less robust protection than customary international law.[155]

1. Application to *Atkins* and *Roper*

The Court could have used *jus cogens* doctrine to support its decisions banning the juvenile death penalty in *Roper* and execution of the mentally retarded in *Atkins*.[156] In determining whether a rule of customary international human rights law has crystallized into a *jus cogens* norm, a court must examine contemporary state practices for indicia of near universal acceptance.[157] Without couching it in the language of international law, Justice Kennedy essentially did this by conducting a factual survey of legal practices throughout the world, including both foreign law and international treaties, concerning the death penalty.[158] Noting that even notorious human rights violators such as Iran, Yemen, and China no longer executed juvenile offenders, Justice Kennedy concluded: "In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty."[159] These facts could have supported the conclusion that the international custom prohibiting the juvenile death penalty had ripened into a *jus cogens* norm and was therefore controlling in this case.[160]

Stevens could have used similar reasoning to support the Court's decision in *Atkins,* given his factual finding that "within the world community, the imposition of the death penalty for crimes committed

---

[155] *See* Rosen, *supra* note 12, at 12 (noting disagreements between Europeans and Americans regarding the appropriate line between privacy and security after September 11, 2001).

[156] *See* Carrie Martin, Comment, *Spare the Death Penalty, Spoil the Child: How the Execution of Juveniles Violates the Eighth Amendment's Ban on Cruel and Unusual Punishment in 2005,* 6 S. Tex. L. Rev. 695, 719–24 (2005); Sawyer, *supra* note 146, at 481. *See generally* Nguyen, *supra* note 146. *But see* Young, *supra* note 23, at 150 n.16 (arguing that few "domestic lawyers [could] take . . . seriously" the contention that the prohibition of the juvenile death penalty is a *jus cogens* norm that controls the interpretation of the Eighth Amendment).

[157] *See* Statute of the International Court of Justice, art. 38(1)(b), *supra* note 136; Foreign Relations Restatement, *supra* note 136, at § 102(2).

[158] Roper v. Simmons, 543 U.S. 551, 575-78 (2005).

[159] *Id.* at 575.

[160] *See id.*; *see also* Nguyen, *supra* note 146, at 433–35 (presenting empirical evidence of a *jus cogens* norm prohibiting juvenile executions).

by mentally retarded offenders is overwhelmingly disapproved."[161] While the Court refuses to admit that when it consults "evolving standards of decency" throughout the "world community" in death penalty cases, it is really interpreting the U.S. Constitution to reflect international human rights law,[162] some lower federal courts are willing to follow the lead and cite *Atkins* for this proposition.[163]

2. Application to *Lawrence*

Customary international human rights law cannot similarly justify *Lawrence*'s use of foreign law.[164] Unlike the prohibition against official torture reflected in the Eighth Amendment, the Fourteenth Amendment's right to engage in private, consensual, intimate contact free from government interference does not have sufficient state practice to have ripened into a rule of customary international law.[165] Further, *Lawrence*'s discussion of foreign law was limited to a discussion of how "Western" jurisdictions conceive of human freedom rather than how the world community writ large perceives it.[166]

---

[161] *See* Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002). "The Court's reasoning in *Atkins,* evokes at the very least natural law theory, and at the most, the very essence of jus cogens." Sawyer, *supra* note 146, at 481.

[162] *See Atkins,* 536 U.S. at 316 n.21. Prior to *Roper,* the Court declined to entertain claims that the juvenile death penalty violated customary international law or a principle of *jus cogens.* Domingues v. Nevada, 528 U.S. 963 (1999), *denying cert. to* Domingues v. State, 961 P.2d 1279, 1279-80(Nev. 1998).

[163] *See, e.g.,* Kane v. Winn, 319 F. Supp. 2d 162, 201–02 (D. Mass. 2004) (reaffirming "the importance of international law in defining the liberties protected by the Bill of Rights").

[164] Privacy rights do not yet enjoy nearly enough recognition, particularly in non-Western courts, to be considered customary international norms, but some privacy rights may achieve that status in the foreseeable future. *See* Foreign Relations Restatement, *supra* note 136, at § 702 cmt. a. For example, the United Nations Human Rights Committee recently acknowledged states' growing recognition of "a right of privacy in intimate relationships, enjoyed by all citizens regardless of sexual orientation" in holding that Australia had violated Article 26 of the International Covenant on Civil and Political Rights by denying a pension to the same-sex partner of a deceased war veteran. Mr. Edward Young v. Australia, U.N. Doc. CCPR/C/78/D/941/2000 (2003) (concurring opinion), *available at* http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/3c839cb2ae3bef6fc1256dac002b3034?Opendocument.

[165] *See* Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (stating that "many countries . . . have retained criminal prohibitions on sodomy").

[166] *See id.* at 573, 576–77; *see also Scalia-Breyer Discussion, supra* note 11, at 531 (comments of Justice Scalia).

III. Analysis

The previous section described two theories that might justify and limit the relevance of contemporary foreign legal practice in domestic constitutional interpretation: a comparative common law approach and a customary international human rights law approach.[167] This section compares the two and argues that the customary international human rights law approach would best address the concerns that Justice Scalia expressed regarding the possible misuses of foreign law in constitutional cases.[168] Its adoption by the Court would better strengthen the political position of its "internationalist" wing, led by Justice Breyer, by restricting the use of foreign law in domestic constitutional interpretation to a limited number of cases in which the human rights considerations are the most pressing.[169]

A. *Cultural Sovereignty*

The customary international human rights law rationale better addresses Justice Scalia's concern that the Court will import alien cultural norms and impose them upon a nation that has not assented to them.[170] As noted above, a rule of customary international law can only be used to trump existing U.S. law if it has attained *jus cogens* status.[171] *Jus cogens* human rights norms, which by definition must enjoy near universal acceptance, transcend cultural differences in that they have their origins in natural law.[172] They only regulate a few categories of behavior—genocide, slavery, murder, torture, prolonged arbitrary detention, systematic racial discrimination—that offend an intrinsic dignity of the human person that all cultures recognize.[173] Their application to U.S. constitutional interpretation would not, therefore, impose alien cultural norms on the United States.[174]

---

[167] *See supra* notes 103–17, 132–55 and accompanying text.

[168] *See infra* notes 170–94 and accompanying text.

[169] *See infra* notes 170–94 and accompanying text.

[170] *See supra* notes 91–94 and accompanying text.

[171] *See* United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995).

[172] *See* Mark W. Janis, *The Nature of Jus Cogens,* 3 Conn. J. Int'l L. 359, 361 (1988).

[173] Foreign Relations Restatement, *supra* note 136, at § 702. For example, most of these human rights are mentioned in the Universal Declaration of Human Rights, whose preamble recognizes the "inherent dignity . . . of all members of the human family . . . ." Universal Declaration of Human Rights, preamble, arts. 4, 5, 9, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (Dec. 12, 1948).

[174] *See* Universal Declaration of Human Rights, pmbl., arts. 4, 5, 9, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (Dec. 12, 1948); Foreign Relations Restatement, *supra* note 136, at § 702.

In contrast, a common law approach to comparative constitutional law does run the risk of importing foreign cultural norms into the U.S. Constitution.[175] For example, federal courts that use contemporary British legal materials to justify limiting the scope of the Fifth Amendment's Self-Incrimination Clause[176] are watering down *Miranda* warnings that have become deeply embedded in an American culture that has a unique conception of civil liberties that our common law cousins do not necessarily share.[177] This is precisely the evil that Justice Scalia condemned in *Roper:* "special reliance on the laws of the United Kingdom . . . a country that has developed, in the centuries since the Revolutionary War—and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental jurists—a legal, political, and social culture quite different from our own."[178] In this respect, the use of contemporary foreign legal materials under the common law approach does pose a threat to U.S. cultural sovereignty.[179]

B. *Potential to Justify Restriction of Domestic Civil Rights*

Unlike the comparative common law approach, the customary international human rights law rationale would, by definition, never be used to restrict the scope of individual rights in the United States.[180] While the use of contemporary legal materials from Britain and former Commonwealth countries in interpreting those provisions of the Bill of Rights with common law origins would generally result in the expansion of individual rights in Eighth Amendment jurisprudence,[181] the opposite is true in Fifth Amendment cases.[182] In contrast, customary international human rights law would be used to set a floor, not a ceil-

---

[175] *See* New York v. Quarles, 467 U.S. 649, 673–74 (1984) (O'Connor, J., concurring); United States v. Sasson, 334 F. Supp. 2d 347, 374–75 (E.D.N.Y. 2004).

[176] *See Quarles,* 467 U.S. at 673–74 (O'Connor, J., concurring); *Sasson,* 334 F. Supp. 2d at 374–75.

[177] *See* Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) ("The Court-pronounced exclusionary rule, for example, is distinctively American."); Dickerson v. United States, 530 U.S. 428, 430 (2000).

[178] 543 U.S. at 626-27 (Scalia, J., dissenting).

[179] *See id.*. at 624–25.

[180] *See* Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis,* 41 HASTINGS L.J. 805, 806–07 (1990).

[181] *See, e.g., Roper,* 543 U.S. at 578.

[182] *See, e.g.,* New York v. Quarles, 467 U.S. 649, 673–74 (1984) (O'Connor, J., concurring); United States v. Sasson, 334 F.Supp. 2d 347, 374–75 (E.D.N.Y. 2004).

ing, for the protection of domestic civil rights and civil liberties.[183] If a domestic constitutional rule already provided a claimant superior protection than a prevailing international norm, the Court could uphold the domestic rule "unless the ordinary conditions for overcoming the presumption of *stare decisis* were met."[184] If the Court limited its use of contemporary foreign legal materials only to a search for *jus cogens* applicable to domestic constitutional interpretation, foreign law would not be invoked, as it was in *Quarles,* to reduce the scope of individual civil rights and civil liberties.[185]

C. *Increased Judicial Discretion*

Finally, the customary international human rights law rationale would result in a more objective, predictable application of foreign legal practice to domestic constitutional interpretation than would the comparative common law approach.[186] While the theoretical underpinnings of *jus cogens* may be abstract, the American Law Institute's *Restatement (Third) of Foreign Relations* and the federal courts have succeeded in limiting its substantive scope to a few areas central to the protection of human dignity.[187] Because these *jus cogens* norms must enjoy near universal state acceptance, as Professor Nadine Strossen argues: "The existence and acceptance of international human rights norms are matters susceptible to objective determination."[188] Under the customary international human rights law rationale, the use of contemporary foreign legal practice could be limited to interpretation of the Eighth Amendment,[189] dealing with the *jus cogens* prohibition against cruel and unusual punishment, and the due process clause, dealing with the *jus cogens* prohibition against torture and arbitrary detention.[190] In the rare case where state practice violated *jus*

---

[183] *See Strossen, supra* note 180, at 806–07.

[184] Larsen, *supra* note 23, at 1325.

[185] *See Quarles,* 467 U.S. at 673–74 (O'Connor, J., concurring). *But see* Mayer-Schönberger & Foster, *supra* note 149, at 135 (advocating the application of *jus cogens* in First Amendment jurisprudence to restrict speech that is currently permitted).

[186] *See infra* notes 187–94 and accompanying text.

[187] United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (finding that prohibition against official kidnapping is not a *jus cogens* norm such as prohibitions against torture, slavery, or genocide); Foreign Relations Restatement, *supra* note 136, at § 702.

[188] Strossen, *supra* note 180, at 830. *But see* Larsen, *supra* note 23, at 1305–07 (challenging scholars and jurists who argue that rules of customary international human rights law are objectively ascertainable).

[189] *See supra* notes 146–50 and accompanying text.

[190] *See supra* notes 151–55 and accompanying text.

cogens and existing U.S. law did not already provide a remedy, then a judge would be obliged to apply the *jus cogens* norm because that norm is binding and nonderogable *erga omnes* (to all states).[191]

In contrast, a judge following the comparative common law rationale is afforded wide discretion to either consult or ignore contemporary foreign legal practices in interpreting the Eighth and Fifth Amendments.[192] The decisions of British and former Commonwealth courts would be always informative, but never binding, and the temptation to make the relevance of the foreign rule depend upon how well it comports with a desired result may be too great to resist.[193] While U.S. state supreme court judges already enjoy a similar level of discretion when consulting judgments from other state supreme courts in interpreting common law and their own state constitutions, the threat that wide judicial discretion can pose to a stable rule of law is amplified when applied to federal courts interpreting constitutional rules with enormous political and social consequences.[194]

Conclusion

Atkins, Lawrence, and *Roper* all reached desirable results on the merits, but all three failed to explain when and why the Court should use contemporary foreign legal practices to assist in domestic constitutional interpretation.[195] Without clear guidelines, the application of foreign law to U.S. constitutional interpretation poses several problems.[196] These risks include the erosion of national sovereignty, vastly increased judicial discretion, and the possibility of someday citing foreign law to restrict the Constitution's protections for criminal defendants and unpopular speakers.[197] Unless the Court at least makes an effort to address these concerns, the conservative backlash against perceived "judicial activism" will only grow, further imperiling the Court's political capital and good relations with its co-equal branches.[198]

---

[191] *See* Foreign Relations Restatement, *supra* note 136, at § 702 cmt. o.

[192] *See Scalia-Breyer Discussion, supra* note 11, at 531 (comments of Justice Scalia).

[193] *See id.*

[194] *See* Scalia, *supra* note 4, at 309. Scalia likens foreign law to legislative history in its capacity to increase the scope of subjective judicial discretion. *Id.*

[195] *See Scalia-Breyer Discussion, supra* note 11, at 525 (comments of Justice Scalia).

[196] *Supra* notes 91–102 and accompanying text.

[197] *Supra* notes 91–102 and accompanying text.

[198] Justice Ginsburg has said of the congressional backlash against the use of foreign law: "Although I doubt the resolutions will pass this Congress, it is disquieting that they have attracted sizable support." Anne E. Kornblut, *Justice Ginsburg Backs Value of Foreign Law,* N.Y. Times, Apr. 2, 2005, at A10. Some on the far right have cited Justice Kennedy's

The Court needs to adopt a limiting principle that makes contemporary foreign legal practice relevant to some constitutional cases but not to others.[199] *Jus cogens* doctrine would provide the Court with a workable rule, giving the application of foreign law a more objective character and sharply restricting the number of occasions on which it would be relevant, but without altering the end result in cases like *Atkins* and *Roper*.[200] The adoption of such a rule would require political courage because it would inspire inevitable criticism from jurists hostile to any application of international law.[201] Given the executive and legislative branches' increasing hostility towards the Court and suspicion of "activist judges," the continuing political cost of not adopting any rule may be greater still.[202]

citation of foreign law in *Lawrence* and *Roper* as grounds for impeachment. Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3.

[199] *See* Larsen, *supra* note 23, at 1322–26.

[200] *See supra* notes 167–94 and accompanying text. As this Note has argued, however, neither of these theories can adequately justify Justice Kennedy's use of foreign law in *Lawrence*. *See supra* notes 121–27, 164–66 and accompanying text.

[201] *See generally, e.g.*, Kersch, *supra* note 132.

[202] *See supra* note 198.